United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1598

To be argued by:

MARK S. LEVY
MARTIN M. KRIMSKY

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RENEE KALSCHEUR, *a minor, by her parents and natural guardians*, and NORBERT KALSCHEUR, and ISABEL KALSCHEUR, in their own rights,

Plaintiffs-Appellees

v.

JACK ROUNICK and LOIS ROUNICK, and 215 EAST 68TH STREET, INC.,

Defendants-Appellants

BRIEF FOR PLAINTIFFS-APPELLEES, RENEE KALSCHEUR, NORBERT KALSCHEUR AND ISABEL KALSCHEUR

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TABLE OF CONTENTS

TABLE OF CONTENTS—*(Continued)*

TABLE OF CITATIONS

TABLE OF CITATIONS—(*Continued*)

INTRODUCTORY STATEMENT

This is an action by the eighteen-year-old plaintiff, Renee Kalscheur, to recover damages for severe lacerations and permanent scarring to her legs that she sustained when she walked through an oversized transparent glass panel door separating the dining room and terrace of one of the apartments in a modern luxury apartment building located in Manhattan. The defendant, 215 East 68th Street, Inc., owned the apartment building and the defendants, Lois Rounick and Jack Rounick, were the tenants of the 20th floor apartment which was the scene of the accident.

At the time of the accident, plaintiff was visiting the Rounicks while she was in New York modeling.

Prior to the happening of the accident, plaintiff was in the apartment with two of her friends waiting for Jack Rounick to take them out to dinner. While waiting in the apartment, plaintiff heard sirens from the street below. Plaintiff went with her friends to the lighted dining room and opened the full length drapes which completely covered the large transparent glass doors. Plaintiff opened the door and walked out onto the dark terrace which had no lighting and her two friends followed. Unbeknownst to plaintiff, one of her friends returned to the apartment and closed the glass door. After a few moments, plaintiff 's other friend told her that the phone was ringing. Plaintiff, only a few steps from the door, turned to the dining room and, believing the door to be open because of the illusion of space created by the unmarked large transparent glass doors, walked through the door.

Defendants were charged with negligence in failing to warn plaintiff of the dangerous illusion of space created by the doors either orally or by placing decals, markings or other suitable warning signs thereon.

Defendants Rounick admitted that prior to plaintiff 's accident, they knew the glass doors were invisible from the terrace at night and that plaintiff 's accident was the third time persons coming from the terrace into the dining room walked into the doors.

The matter was tried before the Honorable William C. Conner and a jury in the United States District Court for the Southern District of New York. The jury returned a verdict in favor of plaintiff in the amount of $31,800.00 to be apportioned equally between the defendant owners and tenants of the apartment building. In response to specific interrogatories submitted by the court, the jury found that all defendants were negligent and that plaintiff was free from contributory negligence.

All defendants have appealed from the judgment of the lower court.

QUESTIONS PRESENTED

The appeal by defendants, Jack Rounick and Lois Rounick, tenants of the apartment where the accident occurred, presents the following questions:

1. Did the trial judge err in denying defendants' motions to dismiss plaintiffs' complaint and for a directed verdict where plaintiffs' evidence established that the unmarked transparent glass doors in defendants' apartment created a dangerous illusion of space known to defendants and of which plaintiff was unaware?

(Answered by the lower court in the negative.)

2. Did the trial judge err in refusing defendants' request to charge the jury that "if it finds that the intervening act of Kelly in closing the patio door while infant plaintiff was on the terrace was 'a substantial cause of her injury,' it must find in favor of the Rounicks" when such request was made after the initial charge by the court and when it was not in accordance with the law?

(Answered by the lower court in the negative.)

The appeal by defendant, 215 East 68th Street, Inc., owner and landlord of the apartment building in which defendants Rounick resided, presents the following questions:

3. Did the trial judge err in denying defendants' motion to dismiss plaintiffs' complaint where plaintiffs presented evidence that the illusion of space created by the transparent glass doors was a latent dangerous condition existing at the time the apartment was let by the Rounicks and which was known to defendant prior to plaintiffs' accident together with evidence that defendant promised to repair the doors and failed to do so?

(Answered by the lower court in the negative.)

4. Was plaintiff required to show that defendant, by an affirmative act, caused her injury?

(Answered by the lower court in the negative.)

STATEMENT OF THE CASE

Plaintiff, Renee Kalscheur, was an eighteen-year-old college student on July 10, 1968. At that time, she was a guest in the apartment of defendants Jack Rounick and Lois Rounick. This apartment was located on the 20th floor of a modern apartment house at 215 East 68th Street in Manhattan and was owned and operated by the defendant, 215 East 68th Street, Inc. (hereinafter sometimes referred to as 'building'). The Rounicks' apartment consisted of five (5) rooms with an outdoor terrace adjacent to the dining room. (A. 36a, 37a, 164a)

The dining room was approximately twelve (12) feet in length and nine (9) feet in width. The north wall of the dining room which was approximately twelve (12) feet in length and eight (8) feet in height contained two glass panel doors which were approximately ten (10) feet in length and approximately six (6) feet nine (9) inches in height. (A. 109a, 110a, 111a) One door remained stationary while the other was a sliding door. Both doors were made of clear glass. It was through this sliding glass door that one entered onto the terrace.

The glass door was surrounded by a metal door frame which was only two and one quarter (2¼) inches wide. (A. 112a) The sliding glass door could be opened to a point where it would give the appearance of one single door, that is, it could be opened to a point where the sliding glass door would be directly in front of the other stationary glass door. (A. 42a) Facing the terrace from the dining room, the sliding glass door was on the left. The door handle of the sliding glass door was the same color as the frame and was attached to the frame itself. (A. 66a) The door handle on the inside of the sliding glass door could not be seen by a person standing on the terrace outside the dining room. (A. 71a) From the outside, on the terrace, the sliding glass door could be opened and closed by pulling on a one and one quarter (1¼) inch protruding lip or vertical edging which formed a part of the frame (See Plaintiffs' Exhibit 4 (A. 278a) and (A. 113a)). From the dining room floor up to

the glass door, there was a step of approximately six and one quarter (6¼) inches. The step down onto the terrace was seven (7) inches. The step was made of mahogany on the inside and white masonry on the terrace side. (A. 58a, 112a, 131a) The sliding door and the stationary door were placed in a groove or track in an aluminum door saddle or treadle located on the underside of the doorway which is shown at the bottom of the photograph marked Plaintiffs' Exhibit 3. (A. 277a) and (A. 130a-131a) The saddle could be seen from the terrace if the door is opened or closed. (A. 134a)

The glass had no markings on it at all. (A. 42a)

Drapes which covered the wall of glass could be opened to the extent that no portion of the drapes would cover any part of the glass doors. (A. 63a) See also Plaintiffs' Exhibits 1, 2 and 3 (A. 275a-277a).

From the photographs and the description given by plaintiff 's witness, it is obvious that it was the intention of the building in designing the doors to make the door frames, saddle, etc. of such insignificance so as to create as wide a glass expanse as possible. (A. 114a) The visibility of glass is increased or decreased in proportion to the relative illumination on both sides of the glass. Thus, the glass would tend to be invisible from the dark terrace at night than it would be during the day time when you have illumination on both sides of the glass. (A. 121a-122a) Defendant, Lois Rounick, admitted that the glass doors were invisible to the eye of an individual who is on the terrace at night time when the dining room chandelier is lighted. There was no light on the terrace at all. (A. 44a-45a) Defendants Rounick were aware of the dangerous condition of the glass doors prior to the date of this accident on July 10, 1968 in that there were two previous accidents involving the same glass doors. On one occasion, defendant Jack Rounick himself had been injured when he bumped into the glass doors when out on the terrace at night and another occasion, a guest of Rounick walked into the glass doors while attending a party. (A. 46a-51a)

The condition of these doors at the time of the accident was the same as when defendant Jack Rounick first moved into the newly constructed apartment building. (A. 164a)

On two occasions Lois Rounick notified the maintenance department of the defendant building of the dangerous condition. The first notice took place in September of 1967. On that day she asked them if there was anything that they could do to make the doors more visible to avoid an accident. She asked for something for the glass and the maintenance department informed her that they would obtain decals. (A. 48a-49a) Again in May of 1968, defendant Lois Rounick notified the maintenance department of defendant building of the condition. She testified:

> I brought up the point that he (maintenance man) hadn't done what he had promised he would do many months prior and would it be alright for me to get decals to put on the windows myself, or was he going to do it, because at that point I was rather irritated. He said no, no, no, he would take care of it and I should not do it myself. (A. 54a)

The building maintenance department had a key to the Rounicks' apartment. Further, the building did on occasion make repairs in the apartment (A. 52a) and reserved the right to do so in the lease itself. (See Defendant, 215 East 68th Street, Inc. Exhibit 5, p. 14 (A. 290a)).

Although plaintiff, Renee Kalscheur, had been in the Rounicks' apartment on a few occasions prior to the accident, she had never been on the terrace at night. (A. 81a) When questioned of the circumstances surrounding the accident, plaintiff testified:

> A. We were sitting in the living room and we heard sirens and noise coming from outside. There was always noise but it was more than usual, a lot more. And one of the fellows, I'm not sure which one, said, let's go see what's going on. I knew that there was a terrace, so I said, let's look from the terrace.

And we went into the dining room and the curtains were closed, so I opened the curtains and then found the lock in the middle, and unlocked the door. And I opened it and I went out. And then Mike Kelly and Mike Wright followed me. And I went to stand towards Third Avenue, so I was closest to the — I was furthest on the left. And Mike Wright was standing next to me and Mike Kelly was standing next to him.

Q. Before you go on, Renee, when you opened the door, did the door make any noise?

A. No.

Q. What was the condition of the glass? Did you see anything on the windows at all, the glass windows?

A. No.

Q. Did they appear that night, except of course for different lighting conditions, but did they appear, the glass doors, substantially as these photographs show that they did?

A. Yes.

Mr. Conway: What number is that exhibit, please?

Mr. Krimsky: I showed P-1.

Q. You slid the door open from which side to which side?

A. Left to right.

Q. You said you walked out. Did you say you walked out first; I'm sorry.

A. Yes.

Q. And the two gentlemen followed you?

A. Right.

Q. How wide had you opened the door?

A. I opened it all the way, because I turned around to watch them follow me, and they were side by side, so it had to be all the way.

Q. And then you were standing on the terrace, you said?

A. Right.
Q. You were the closest to Third Avenue and Mike Wright was next to you and Mike Kelly was next to him. How long had you been out there?
A. I would say between five and ten minutes, not more than that, definitely.
Q. During that time did you have any conversation?
A. Yes. I don't remember what was said, but we were definitely talking about what we were trying to figure out was going on.
Q. Was going on where?
A. Up on Third Avenue. We couldn't really see. We heard a lot of noise and saw a lot of cars.
Q. Then what happened?
A. Then Mike Wright said to me that the phone was ringing. And I was expecting Jack to call, so I turned around and—
Q. Which way did you turn?
A. I turned to my left, because that was the closest way to go.
Q. Which would be away from the other fellows?
A. Right. And I looked ahead of me, and I saw that the door was open, or it looked to me as though it was open, very definitely. And I walked in to get to the phone, and when I—I stepped up, because you could step—well, it doesn't matter, but you could step all the way over the little ledge, and that's what I think I had in my mind, and the glass broke all around me, on the floor, and I looked ahead of me and Mike Kelly was coming in from the living room and he said, 'Oh, my God, are you all right,' I'm sorry. And he said that he had closed the door, and then I looked at my leg and I could see a big white hole. And then I knew that there was something the matter, and it started to bleed, and I started to cry.

That's what happened.

Q. Renee, when you were coming into that space that you thought was an open door, you said you brought your right foot up, put it up a step, or whatever. Did anything come in contact with anything at that point?

A. My knee hit the glass first and I put my hands up like this.

. . .

Q. Why did you put your hands up?

A. To protect my face. It was an instant reaction.

Q. At the time that you were coming in from the terrace through the door, how would you characterize your mode of walking? In other words, were you at a slow pace, a moderate pace, or were you hurrying, or what?

A. Fast. I heard the phone ringing, I was going fast—no, I didn't hear the phone ringing, as a matter of fact.

Q. You did not hear the phone ringing?

A. No, I heard him say it, so I assumed that the phone was ringing.

Q. And you turned to your left and you started walking through. You say you did not hear the phone ring or you don't recollect whether you heard it ringing?

A. Well, I don't remember. It might have been ringing. I just sort of blacked out everything that happened, anyway.

Q. How many steps would you say that you took crossing the terrace?

A. I would say four, maximum.

Q. Renee, as you were walking towards the doorway, or what you thought was the doorway, what appearance did that doorway give to you?

A. It looked as though there was nothing there. I am very conscious of anything in front of me. I'm not —well, that's my character.

Q. It was brought out through the testimony of your sister that you are nearsighted. Were you wearing your glasses that night?
A. Yes. I was wearing my glasses.
Q. Was there any reflection whatsoever on the glass doors that evening, from the outside?
A. No, it looked completely clear. (A. 85a-88a)

ARGUMENT

Plaintiffs' Reply to Point One of Defendant Rounick

I. The plaintiffs did establish a cause of action against defendants Rounick notwithstanding the social guest rule of New York and therefore the lower court properly denied defendants' motion to dismiss plaintiffs' complaint and defendants' motion for a directed verdict.

It is the duty of an occupier of premises to exercise reasonable care to disclose a dangerous condition known to the occupier and not likely to be discovered by his social guest. *Krause v. Alper*, 4 N.Y.2d 518 (1958).

It is undisputed that plaintiff, Renee Kalscheur, was a social guest of defendants Jack and Lois Rounick at the time of her unfortunate accident. Thus, the question arises whether or not the "illusion of space" created by the glass doors in the Rounicks' dining room was a dangerous condition which was known to the Rounicks and which was not likely to be discovered by plaintiff.

The doors, dimensions and descriptions thereof, were hereinbefore set forth and the same will not be repeated at this time, however, it is obvious that the building constructed the large glass doors of such dimension and proportions so as to give the effect of an open wall and bring the outdoors indoors. There were very small frames for extremely large pieces of glass. The door handle, jams, saddle, track, etc. were designed so as to give as wide a glass expanse as possible. (A. 110a-114a) There were no decals or any other markings on the glass. The desire of the building to create an "illusion of open space" was very definitely achieved.

Defendants Rounick were aware of this illusion of space and knew that the doors were extremely dangerous and that the glass doors were not discernible to one standing on the terrace at night. (A. 44a-45a)

Two people had been involved in accidents with the doors in question previous to the within accident. (A. 47a, 49a-50a) One of those persons was the defendant, Jack Rounick, himself. (A. 47a) Further evidence of the knowledge of the existence of this dangerous trap by the defendants Rounick was that defendant Lois Rounick, at the direction of defendant Jack Rounick, on two occasions notified the building maintenance department of this condition. (A. 49a-50a) However, they knew that this hazard could be eliminated by simply placing a small decal or tape on the glass.

At the close of plaintiffs' case, counsel for the Rounicks moved to dismiss the complaint stating that the duty of the Rounicks was "to use reasonable care to disclose any danger known to (them), but not likely to be discovered by Miss Kalscheur (the minor plaintiff)." (A. 145a) However, in support of that position, counsel stated that the defendants did "not have to guard against the remote possibility of the happening of an accident which could not reasonably be foreseen or anticipated. . . ." Counsel then continued, "Certainly there was nothing about the door that was a hidden trap known only to the Rounicks and not discoverable and not discernible by Miss Kalscheur." (A. 145a) In denying counsel's motion, the trial judge stated that these were questions for the jury.

In setting forth the duty of defendants Rounick, the trial judge stated:

> (I)f the tenant (Rounick) actually knows that there exists on the premises a dangerous condition which presents an unreasonable risk of harm to his guests, and that the guests are not likely to discover the condition and to realize the risk, the tenant has a duty to exercise reasonable care either to correct the condition or to warn his guests of the condition and risk.

The lower court then left it to the jury to decide if the Rounicks knew that the glass panel door was dangerous

and if it was a danger not likely to be realized by plaintiff. The court clearly indicated to the jury that if they found either that the tenants did not know the glass panel door was dangerous or that the Rounicks had a right to expect that their guest would realize the danger, then they should find for the defendants. (A. 199a-200a)

Defendants Rounick rely solely on *Bua v. Fernandez*, 15 N.Y.2d 664 (1964), as authority for their position that the court should have dismissed plaintiffs' complaint or entered a directed verdict.

In *Bua, supra*, an infant social guest in the home of defendants walked into a glass sliding door leading from the playroom to an outside patio. A review of the record of that case discloses that the minor plaintiff had played with defendants' children in their house three or four times a week for several years prior to the accident and had previously opened the glass door from the playroom to the patio on several occasions. The minor plaintiff testified that she had been playing with defendants' child in the playroom for awhile before she decided to walk onto the patio. No testimony was offered to show that the glass door in the playroom had been opened by anyone prior to the accident on that day so as to give Bua reason to believe the door was open. To the contrary, Bua testified that she and her friend were the only persons in the playroom and that she was first to walk outside. She testified:

> Well, we were playing downstairs in the playroom . . . and I decided to go out into the patio. So, I went to walk out with my doll and then I just hit something and then fell down and I got cut.

There was no evidence admitted to show that the glass door was dangerous or that defendants knew that it was dangerous. The lower court, sitting without a jury, found in favor of the minor plaintiff. In affirming, the Appellate Division of New York indicated that it was defendants' duty to disclose dangerous conditions known to defendants and not likely to be discovered by plaintiff. The court held that

"(u)nder the circumstances here, whether the defendant owner properly discharged his duty was an issue of fact." *Bua v. Fernandez*, 21 A.D.2d 887 (1964) (emphasis added).

In reversing the Appellate Division, the Court of Appeals of New York indicated that there was no evidence that the defendant homeowners knew the door was a trap or hidden danger and adopted the dissenting memorandum at the Appellate Division which stated that *"under the circumstances here* the glass door did not constitute a trap or hidden danger of which the plaintiff, a social visitor, was unaware; and hence the defendant owner did not have any duty to give said plaintiff special notice or warning with respect to such door." *Bua v. Fernandez*, 15 N.Y.2d 664 and 21 A.D. 887 (1964) (emphasis added).

The only conclusion that can be drawn from the reversal by the Court of Appeals in *Bua* and the dismissal of plaintiffs' complaint, is that, after a review of the record, the appellate court was of the opinion that *under the circumstances presented in that case*, insufficient evidence was presented by plaintiff to show that the glass door in the playroom of the Fernandez home was a trap or a danger of which plaintiff was unaware and that defendant in fact knew of the danger so as to give said plaintiff special notice or a warning. However, a motion for a directed verdict or for the dismissal of a complaint should only be granted under exceptional circumstances. In a personal injury case the question of negligence is primarily one for the jury, *New York State Electric & Gas Corp. v. J.C.A. Truck Leasing*, 106, 24 A.D.2d 1061 (1965) and the standard to be applied in determining whether to grant defendants' motion is not whether a verdict in favor of plaintiff would be set aside as contrary to the weight of credible evidence, but whether the jury could find for plaintiff by any rational process. *Bernstein v. Berman*, 330 N.Y.S. 2d 477 (1972). In the instant case, there was sufficient evidence upon which the jury could find negligence and find for plaintiff.

The Court of Appeals in *Bua* as well as the dissents

in the Appellate Division, limited their decision to the facts of that case. In the instant case, however, there is no question that plaintiff clearly presented evidence that the glass doors were a dangerous condition known to defendants of which she was unaware.

It is important to note that the Appellate Division of New York has stated that "(t)he law with respect to damages caused to persons walking into glass doors seems to turn on *a close analysis of the facts in each individual case.*" *Madey v. Gray Drug Stores, Inc.*, 40 A.D. 270 (1973) (emphasis added).

Although defendants Rounick would like this Court to believe that the *Bua* decision is a definitive ruling that all glass doors are not dangerous, the law in New York and other jurisdictions is to the contrary. As a matter of fact, the Appellate Division of New York has unequivocally stated that under certain circumstances, a glass door may be maintained in a manner so as to constitute negligence. *Luciano v. Mapart, Inc.*, 14 A.D.2d 843 (1961) and *Vella v. Seacoast Towers "A", Inc.*, 32 A.D.2d 813 (1969).

Furthermore, realizing the danger of transparent glass doors, the New York legislature has adopted a statute making it mandatory to mark such doors:

> All transparent glass doors . . . in public buildings . . . shall be marked in such manner as shall be calculated to warn persons using the same that such doors are glass doors. 30 *McKinney* §241-6.

The Statute includes an apartment building in the term "public building." 30 *McKinney* §2. Although the lower court refused to include this Statute in its charge (A. 35a-36a), it is certainly obvious that unmarked glass doors are a hidden hazard.

Madey v. Gray Drug Stores, Inc., supra, presents striking similarities to the instant case. In *Madey*, plaintiff, an 18 year-old-man, walked at a fast pace through a plate glass door of the defendant Gray Drug Stores, Inc. The plaintiff testified that when he left the store to make a phone call,

the glass door was open. Needing more change for his call, plaintiff stated that he then

> "turned around, looked at the drug store, and there were people inside. The lights were on. There were still people at the counter where I had just gotten change from. So I just in the manner as I had gone in before . . . hurried in to get the rest of the change . . . while the operator was waiting for me on the line . . . I am looking at the lady at the counter, walking in to get change, and, 'crash'. I didn't see the glass at all. There was no marking on it."

Id., 271.

The appellate court approved that the case was submitted to the jury and indicated that it was reasonable to conclude that the jury found that defendant "could easily have placed marking, lettering, decals, push rail, door knobs, door handles, masking tape, posters, signs or otherwise marked the glass door to warn plaintiff of its existence and that the injuries and damages suffered by the plaintiff came about as a result of its failure to do so." *Id.*, 273. See also *Shannon v. Broadway and 41st Street Corp.*, 272 A.D. 1029 (1947), and *Jaillet v. Godfried Home Bakeries, Inc.*, 354 Mass. 267 (1968) (holding that whether the plaintiff's conduct was reasonable and foreseeable, and whether the defendant failed in its duty to him, were questions of fact for the jury).

Defendants allege that "any risk to be perceived (by the doors) was as perceptible to plaintiff as to defendants" and therefore, she was under the same duty of care in checking to see whether the door was in fact open or closed as either of the Rounicks would have been. Contributory negligence has not been raised as an issue on appeal in this case apparently because the issue was squarely presented to the jury (A. 197a, 198a, 199a, 200a, 203a) and also because it has been held that when the illusion of space is so successful that a person is injured in mistaking the illusion for reality, he cannot be charged with contributory negligence as a matter of law. *Grabel v. Handro Co.*, 161

N.Y.S. 2d 998, 999. Therefore, defendants' assertion that if the Rounicks should have realized the danger so should have plaintiff seems to be an argument for the proposition that there was no need to warn plaintiff. However, defendants fail to point out that it was not until Jack Rounick, one of the defendants, walked into the glass door from the terrace in September, 1967, that the danger was first realized by those defendants (A. 47a). Furthermore, the danger was again made known to defendants in May, 1968, when a guest of defendants walked into the glass door. (A. 49a) Thus, until defendant's own accident with the glass door occurred, he and his wife Lois were unaware of the hidden hazard that existed in their apartment. Having learned of the danger, not once but on two occasions, they were bound to warn their guests of the condition. As defendant Lois Rounick candidly testified:

> These glass doors were difficult to see from the outside.
>
> . . .
>
> (I)f you are standing in the dark and you are looking into a brightened room, unless you are totally aware of glass in front of you, you cannot see it. There is no reflection. (A. 44a-45a)

Therefore, it is quite clear that defendants Rounick did not need "prophetic vision", as defendants would like us to believe, to have anticipated that the plaintiff might walk into the glass door in that their previous experience dictated that if it happened twice before it could certainly happen again.

Having shown that defendants knew of the dangerous glass doors and also that it was unlikely that one unfamiliar with the danger would realize it on his own, plaintiff established a cause of action against defendants pursuant to the social guest rule of New York and the trial judge properly submitted the issue of liability to the jury.

Plaintiffs' Reply to Point Two of Defendant Rounick

II. The trial judge properly denied defendants' request to charge the jury that "if it finds that the intervening act of Kelly in closing the patio door while infant plaintiff was on the terrace was 'a substantial cause of her injury', it must find in favor of the Rounicks" especially since said request was made after the initial charge by the court and that the supplemental requested charge was not in accordance with the law.

In his initial charge, the trial judge instructed the jury that if they found the defendants negligent, that a necessary element of the plaintiff's claim was that that negligence must be a proximate cause of her injuries. (A. 197a) In defining proximate cause, the court stated:

> [A]s to the requirement of proving proximate cause, an act or omission is a proximate cause of an injury if it is a substantial factor in bringing about the injury, either immediately or through a natural and continuous sequence unbroken by any intervening cause. (198a)

Defendants failed to request any points for charge on the issue of proximate cause or intervening cause in their original request. (A. 216a) Instead, as an afterthought and after the court's initial charge, counsel for defendants Rounick asked:

> I ask Your Honor to tell the jury that if they find an intervening act of the plaintiff's friends was a substantial cause of her injury and the proximate cause of any, defendant's possible negligence is broken and you must find for the defendants Rounick.

The court replied:

> I have already given them the general charge in defining proximate cause as including a continuous chain of causation unbroken by any intervening cause.

. . .

> I think my definition is sufficient. I am afraid if I mention the intervening act I give it undue suggestiveness and they might infer from that that I consider that an intervening act.

Counsel for Rounick answered:

> I think it is a substantial factor that should have been charged in the main charge.

The trial then stated:

> I don't believe there is a request for that charge. I am afraid if I go back to it now I am going to give it undue suggestiveness.

(A. 205a-206a)

After a party has had a reasonable opportunity to present his requests for instructions, he cannot complain of limitations put upon the exercise of his right by the court acting in the exercise of sound discretion. *O'Neill v. Drydock E.B. & B.R. Co.*, 129 N.Y. 125 (1891). Requests for charge held until after the main charge confuses the jury and destroys the effect of the main charge. *Fallon v. Mortz*, 110 A.D. 755 (1906). In the instant case, counsel was afforded ample opportunity to present a point for charge on the issue of proximate cause but failed to do so. Therefore, defendants cannot now complain prejudice after the judge refused to instruct the jury as requested after the main charge. The ruling by the court was an exercise of sound discretion.

Moreover, it is well settled that it is proper for the court to refuse to charge as requested where the matter has been fully covered by the main charge. *Gaebler v. Gallo*, 198 N.Y. 344 (1910). If the charge, as given, contains in legal effect the requested charge, the party making the request has no justified complaint if the exact language of the requested charge is not incorporated in the charge as given. *Lilley v. Uvalde Asphalt Pav. Co.*, 127 A.D. 310 (1908). Here, the

trial judge clearly presented to the jury that to be the proximate cause of plaintiff's injury, defendants' negligence in failing to mark the glass doors and failing to warn her of the danger had to be a substantial factor in bringing about that injury "either immediately or through a natural and continuous sequence unbroken by any intervening cause." (198a) Although a trial judge should review the evidence where it is so complicated that an analysis is desirable to enable the jury fully to understand the case which they are to resolve, in a case where the questions are simple and the evidence is brief, the court may, after stating the general propositions of the law applicable to the case, properly refuse to charge how the jury should determine the case if they find one way or another as to particular facts. *Smith v. Gray*, 19 A.D. 262, *aff'd.*, 162 N.Y. 643 (1900).

Defendants Rounick contend that *Green v. Downs*, 27 N.Y.2d 205 (1970), is authority for their proposition that the trial judge erred in charging the jury in "general and purely abstract form" and not in the factual context in which the issue was presented at the trial. In *Green*, however, the court found error because of an almost lack of specificity in the over all charge and in the failure of the court to outline the "disputed issues of fact." *Id.*, 208-209. In the instant case, the facts surrounding the accident were not in dispute and after stating that plaintiff was injured when she walked into a glass door, the court clearly and concisely related the issue of liability to the jury:

> Plaintiffs claim that the failure of defendants either to mark the glass panel so that it was clearly visible and could not be mistaken for unobstructed space, nor to warn Renee about the danger involved, constitutes negligence which caused her injury. Defendants deny they were negligent and contend that the injury was caused by Renee's own negligence. (197a)

Immediately thereafter, the court defined and expressed the necessity to the plaintiff's case of showing proximate cause as stated earlier. (A. 197a-198a) The facts relating

to the happening of the accident were simple, free from ambiguity and uncontroverted. Thus, the discussion of the court in the *Green* case cited by defendants is not applicable to the instant case. Moreover, defendants agree that the facts surrounding the occurrence of this accident to plaintiff are undisputed and defendants thus claim that "the issue of proximate cause is one of law for the Court and not one of fact for the jury." (See defendants' brief at 23 and cases cited therein.)

Of most importance, however, is that the refused request as stated was improper and not in accordance with the law. To relieve a defendant of liability for an injury to a plaintiff, it must appear that the intervening cause so entirely supersedes his negligence that it alone, without his negligence contributing thereto in any degree, produces the injury. *Foley v. State*, 265 A.D. 682 (1943). The act of the third party must be a new and independent force or agency breaking the chain of causal connection between the original wrong and the result. Re *Kerrigan's Estate*, 20 Misc. 2d 1, same conclusion reached on reh. 30 Misc. 2d 448, *rev'd. on other grounds*, 16 A.D.2d 811 (1959). However, where an intervening independent act might have been reasonably foreseen, the original wrongdoer remains liable for resulting injury. *Kingsland v. Erie County Agricultural Soc.*, 298 N.Y. 409 (1949). In such case, there is no break in the chain of causation of such character as to relieve the original wrongdoer, even though the intervening act is deliberate and independent, but an innocent act of a human being. *Carlock v. Westchester Lighting Co.*, 268 N.Y. 345 (1935).

Therefore, defendants' requested charge was erroneous for even if the jury believed that Kelly's act of closing the glass door was an intervening act, it could not relieve defendants of liability as contended in the requested charge in that his act was innocent and reasonably forseeable by defendants. Kelly's act did not break the chain of causal connection between the original negligence of defendant and the result. Clearly, it is under such circumstances

where a person passes through an opening and upon his return finds the opening obstructed by a glass door creating an "illusion of space" that liability is predicated. See *Madey v. Gray Drug Stores, Inc., supra* and cases cited therein.

It is settled law that a requested charge is properly refused if any part thereof is incorrect and the court need not analyze the request for the purpose of separating the good from the bad. *Hamilton v. Eno*, 81 N.Y. 116 (1880). If it is not entirely good, the court does not err in refusing to give the charge. *Cobb v. Metropolitan Street R. Co.*, 56 A.D. 187 (1900).

Plaintiffs' Reply to Point One of Defendant 215 East 68th Street, Inc.

III. Defendant's motion to dismiss plaintiffs' complaint was properly denied in that sufficient evidence was presented to show that defendant failed in its duty to repair the dangerous condition caused by the glass panel doors in Rounicks' apartment.

Defendant, 215 East 68th Street, Inc., contends that there was no duty imposed upon it under the law of New York to place decals or other markings on the glass doors so as to repair the dangerous illusion of space. However, a landlord of a multiple dwelling *is* under a duty to repair and/or improve dangerous conditions in all parts of those buildings, whether or not demised, and whether or not used in common by all the tenants thereof. *Multiple Dwelling Law*, §78. The Multiple Dwelling Law has shifted the obligation to repair dangerous conditions from the tenant to the landlord. *Altz v. Leiberson*, 233 N.Y. 16 (1922). It was the evident purpose of the Multiple Dwelling Law in the case of failure of the landlord to repair any part of a multiple dwelling, to impose liability upon him for the benefit of the tenants and their families and also persons lawfully invited onto the premises. *Cullings v. Goetz*, 256 N.Y. 287 (1931). It should be noted that liability arises where the

landlord had actual or constructive notice of the defect in question and thereafter failed to make the necessary repairs within a reasonable time. *Tkach v. Montefiore Hospital For Chronic Diseases*, 289 N.Y. 387 (1943).

In the instant case, it is admitted that the defendant, 215 East 68th Street, was the owner and landlord of the building containing the Rounicks' apartment and the scene of the accident. The building was more than twenty stories high and contained approximately 500 apartments. (A. 37a) Thus, 215 East 68th Street was a multiple dwelling within §78 of the Multiple Dwelling Law. *Multiple Dwelling Law*, 4, p.7.

Defendant Lois Rounick testified that she notified defendant 215 East 68th Street, Inc., of the dangerous condition in September of 1967 and again in May of 1968. (A. 48a-50a) It has already been shown, in reply to Rounicks' brief, that sufficient evidence was presented to show the dangerous condition of the glass doors. Therefore, having actual knowledge of the danger, defendant was under a duty to repair or improve the condition.

In addition to the statutory duty previously set forth, it has been held that it is the duty of a landlord to warn the tenant of a latent dangerous condition on the premises and that his failure to do so may constitute negligence rendering him liable to the tenant. *Cesar v. Karutz*, 60 N.Y. 229 (1875). In that it is a well-settled general rule that the duties and liabilities of a landlord to persons on the leased premises by the consent of the tenant are the same as those owed to the tenant himself, *Hicks v. Smith*, 158 A.D. 299 (1913), the duty to warn of the dangerous condition extends to a tenant's social guest. Therefore, in that the glass doors in the Rounicks' apartment were a latent danger existing at the time the apartment was let, (164a) the duty to warn of the danger remained with the landlord and the failure to place decals or other markings on those doors constituted a breach of the duty.

Additionally, under common law, a landlord has a duty to repair those defects in the parts of the building

within his control. *Harrington v. 615 West Corp.*, 2 N.Y.2d 476 (1957). It has been held that when a landlord reserves in the lease the right to enter the demised premises, to examine them, and to make such repairs as the landlord deems necessary or desirable, he is assumed to have retained a privilege of ownership sufficient to give rise to a liability in tort. *DeClara v. Barber S.S. Lines*, 309 N.Y. 620 (1956). Moreover, it is held that where a landlord promises to make repairs and reserves the right at any time to enter the premises to inspect and make such repairs, and has in fact entered during the tenancy to make repairs, control is evidenced sufficient to hold the landlord liable for his failure to do so. *Id.* In the instant case, the lease between defendant, 215 East 68th Street, Inc., and defendants Rounick reserved to the landlord the right to enter the Rounicks' apartment, to examine it and to make repairs where necessary or desirable. (See Defendant 215 East 68th Street's Exhibit 5, p. 14 (A. 290a)). Furthermore, defendant, 215 East 68th Street, Inc., through its servants in the maintenance department, promised to put decals on the glass doors. (A. 49a, 50a, 54a) In fact, they prohibited Rounicks from placing decals or markings on the door both orally (A. 54a) and in the lease. (See defendant 215 East 68th Street's Exhibit 5, p. 4 (A. 288a)). Finally, it was shown that all repairs to the Rounicks' apartment were made by the staff of the defendant landlord and access could be gained by use of a master key which was in their possession. (A. 52a)

Thus, it is quite apparent that defendant 215 East 68th Street, Inc., had sufficient control of the demised premises so as to be bound to repair dangerous conditions existing thereon. This duty is compounded, moreover, by the landlord's promise to repair the doors with decals. Defendant claims this was a voluntary promise not supported by consideration to support the promise, however, the Rounicks' forbearance from placing markings or decals on the doors was sufficient consideration to support the promise.

Defendant contends that it had no duty to warn the

Rounicks' or plaintiff of the condition of the glass doors in that they were clearly observable to the Rounicks and plaintiff. However, plaintiff's case is not predicated on whether or not glass doors were present but rather on the dangerous condition created by the illusion of space when one walks from the unlighted terrace at night to the brightly lighted dining room of the apartment. This point has been amply discussed in reply to Rounicks' appeal and therefore no further discussion is deemed necessary.

Thus, defendant's duty to plaintiff having been shown both statutorily and at common law, it is clear that the court did not err in denying defendant's motion to dismiss plaintiff's complaint.

Plaintiffs' Reply to Point Two of Defendant 215 East 68th Street, Inc.

IV. It was not necessary for plaintiff to show an affirmative act of defendant in order for her to support her cause of action in that plaintiff was only required to show that the illusion of space created by the glass door was a hidden danger of which she was unaware and that defendant failed to warn her or correct the hazard by placing decals or other markings on the glass.

Defendant contends that in order to prevail in her cause of action, plaintiff must prove that her accident was preceded by an affirmative act of defendant. In support of their contention defendant cites *Madey v. Gray Drug Stores, Inc.*, 40 A.D.2d 270 (1973); *Shannon v. Broadway and 41st Street Corp.*, 272 A.D. 1029 (1948) and *Grabel v. Handro Co.*, 161 N.Y.S. 2d 998 (1955).

In *Madey*, as previously discussed, the plaintiff walked from a store when the glass door was open and, upon his return, walked into the door after *someone* closed it. There was no evidence presented as to *who* closed the door. To the contrary, the court never mentioned the term "affirma-

tive act." Instead, the court indicated that liability arises where a defendant creates an "illusion of space" by using unmarked transparent glass doors and fails to warn persons using the passageway of the obstruction by placing some type of marking on the glass *Madey v. Gray Drug Stores, Inc., supra*, 273. The court held that whether the glass gave an illusion of unobstructed space so that a reasonable man might fail to note its existence presented questions of fact for the jury. The court then cited *Jaillet v. Godfried Home Bakeries*, 354 Mass. 267 (1968) as a case of similar circumstances. *Id.* It is important to note that the *Jaillet* case also did not deal with an "affirmative act" of the defendant in closing a glass door. In fact, in *Jaillet*, the plaintiff walked into a pane of plate glass which formed the front wall of the entrance to defendant's "bakery-delicatessen." The court stated that the issue was whether a reasonable man might fail to see the glass outer wall of the vestibule and believe that his path to the front doors was unobstructed. *Id.*, 269.

In *Shannon v. Broadway and 41st Street Corp., supra*, and *Grabel v. Handro, supra*, defendant claims that there were affirmative acts of the defendant upon which negligence was founded but these assertions are not supported by the facts of the cases.

Defendant further contends that where there is no "affirmative act" of defendant, there should be a dismissal citing *Cooper v. Sharf*, 11 A.D. 2d 101 (1960). However, it must be briefly pointed out that the reason plaintiff was denied recovery in *Cooper* was not because there was no affirmative act of defendant, but because the glass doors in question were at the end of a narrow hallway and one panel had the name of defendant's shop lettered on it while the other had a metal guard or push rail running horizontally across the middle of the door. *Id.*, 102. The *Cooper* court indicated that recovery was denied because the glass doors were not of such a character that danger would reasonably be anticipated from them by a person exercising ordinary care. *Id.*, 102-103. The court made no reference

to "affirmative acts" of defendant but was concerned only with whether or not plaintiff presented evidence to show that the condition was dangerous and upon which a jury could find negligence. *Id.*

Thus, defendant's contention that recovery of a plaintiff is limited to cases in which there is an "affirmative act" of defendant is simply not supported by the law.

CONCLUSION

The judgment against the Rounicks should be affirmed in that plaintiff sufficiently presented her cause of action and it was properly submitted to the jury. Furthermore, the trial judge properly refused defendants' request for charge made after the main charge and which contained misstatements of law.

As to defendant, 215 East 68th Street, Inc., the lower court properly denied defendant's motions to dismiss the complaint and for a directed verdict in that breaches of both statutory and common law duties were shown by plaintiff in that defendant failed to mark the glass panel door in the Rounicks' apartment so as to warn the plaintiff of the dangerous condition existing thereon.

Respectfully submitted,

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